Filed 6/2/04 Valdez v. Principal Residential Mortgage CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

ALMA VALDEZ et al., Plaintiffs and Appellants, v. PRINCIPAL RESIDENTIAL MORTGAGE, INC., et al., Defendants and Respondents.	B163832 (Los Angeles County Super. Ct. No. NC031237)

APPEAL from a judgment of the Superior Court of Los Angeles County. Tracy T. Moreno, Judge. Affirmed.

Alma Valdez and Joel Alcarmen, in pro. per.; and David A. Smyth for Plaintiffs and Appellants. [Retained.]

The Buckley Firm, John W. Klein and Darlene C. Vigil for Defendants and Respondents.

* * * * * *

Alma Valdez (also known as Alma Alcarmen) and Joel Alcarmen appeal in propria persona from a judgment that was entered after a demurrer to their second amended complaint (SAC) was sustained without leave to amend. We affirm the judgment.

BACKGROUND

1. Facts

Eduardo Mayoral owned residential property in Long Beach, California. In November of 1999, he executed a $128,838 promissory note and trust deed on the property in favor of Stuart-Wright Mortgage (SWM), the predecessor of respondent Principal Residential Mortgage, Inc. (Principal).

In March or April of 2001, Mayoral executed a grant deed on the property in favor of appellants. The grant deed was recorded in May of 2001.[1] Appellants do not contend that they or Mayoral ever asked for or received consent from SWM or Principal to transfer the property to appellants.

The property went into default for failure to pay on the promissory note, and foreclosure proceedings were instituted. Respondent Buckley & Associates, Inc. (Buckley), facilitated a trustee's sale, which was eventually held on October 22, 2001. The buyers at the sale were Sue Wha-Sook Chung and Charlie Chul-Woong Chung, who are not parties to this appeal.

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[1] In the complaint, appellants allege that they received the grant deed from Mayoral on March 5, 2001, and recorded it on May 16, 2001. In his declaration in opposition to the demurrer to the SAC, Mayoral states that he gave a grant deed to appellants on April 15, 2001, and that deed was recorded on May 6, 2001. In their opening brief, appellants state that the grant deed was dated January 5, 2001 and was recorded on May 21, 2001.

2. Procedural history

On December 10, 2001, appellants sued Principal, Buckley and the Chungs. The complaint contained causes of action to set aside the trustee's sale, to cancel the trustee's deed, to quiet title, for an accounting, and for fraud. A general demurrer was successfully interposed by respondents.

Appellants filed a first amended complaint (FAC) that contained the same causes of action. The allegations in the FAC were virtually identical to those of the original complaint. Respondents again demurred, and again prevailed. The trial court sustained the demurrer to the first four causes of action without leave to amend. The court also sustained the demurrer to the fraud cause of action, but with leave to amend.

Appellants then filed the SAC, which did not materially differ from the FAC. Respondents' demurrer was sustained without leave to amend. Appellants' request for further leave to amend was denied, and judgment was thereafter entered in favor of respondents.

CONTENTION ON APPEAL

Appellants contend that the SAC contains sufficient facts to state a cause of action for fraud. Appellants further aver that the trial court erred in not granting leave for an additional amendment.[2]

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[2] In their opening brief, appellants challenge the trial court's ruling as to the FAC by stating that "Appellants should have been given opportunity to amend the complaint to include a cause of action for wrongful foreclosure in the alternative as a tort cause of action which requires merely a showing of negligence." No supporting facts or authorities were cited by appellants. Thus, that issue is waived on appeal. (*Wiz Technology, Inc. v. Coopers & Lybrand* (2003) 106 Cal.App.4th 1, 9, fn 1.)

Further, in the reply brief, appellants for the first time state that the trial court erred in sustaining the demurrer without leave to amend as to the first four causes of action. However, new issues may not be raised for the first time in a reply brief. (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3; *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.) In any event, we have reviewed the complaint and the

DISCUSSION

1. Standard of review

On appellate review of a dismissal based on the sustaining of a demurrer, we accept as true all material facts that are properly pleaded. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) However, we are not obliged to accept contentions, deductions or conclusions of law or fact. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125.)

2. Pleading requirements for fraud

The elements of a cause of action for fraud are: (1) a false representation; (2) knowledge by the defendant of the falsity; (3) intent by the defendant that the plaintiff rely on the false representation; (4) reliance by the plaintiff on the false representation, and (5) resultant damage to the plaintiff. (*Small v. Fritz Companies, Inc*. (2003) 30 Cal.4th 167, 173 (*Small*).)

In setting forth a claim founded on fraud, a plaintiff must be careful to plead specific facts that show the wrongful conduct. As our Supreme Court recently stated, '"In California, fraud must be pled specifically; general and conclusory allegations do not suffice. [Citations.] "Thus '"the policy of liberal construction of the pleadings . . . will not ordinarily be invoked to sustain a pleading defective in any material respect."' [Citation.] This particularity requirement necessitates pleading *facts* which 'show how,

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FAC, and find that the demurrers were properly sustained as to the first four causes of action. The allegations are simply conclusions of law without supporting facts. Nowhere in the record or in their appellate briefs do appellants state how the first four causes of action could be further amended to state facts rather than conclusions of law.

On May 12, 2004, eight days before oral argument of this matter, attorney David Smyth substituted in as counsel for appellants. In a letter to us, he contended that as non-assuming grantees, appellants "have the statutory right to timely cure the default, and are entitled to institute an action for damages if respondents illegally prevented them from doing so." Once again, such language is merely conclusory with no facts in support.

when, where, to whom, and by what means the representations were tendered.'"' [Citation.]" (*Small, supra*, 30 Cal.4th at p. 184.)

3. The allegations of the SAC

a. Count one

The SAC attempts to allege three separate "counts" of fraud. In the first, appellants contend that in two conversations in early August and early September of 2001, they contacted a representative of Principal and told that person of appellants' status as owners of the property and that appellants had a buyer for the property. Appellants claim that the representative said that Principal would provide appellants with all payoff information, and would do so at appellants' new address in Northern California. Appellants complain that the information was sent to an incorrect address, and was never received by them, and as a result, they were not informed of the trustee's sale and were thus unable to sell the property or otherwise reinstate the loan.

Those allegations are obviously insufficient to constitute fraud, as there are no facts alleged that Principal *intentionally* failed to mail anything to appellants. The only wrong asserted is that the information was mailed to the wrong address.

b. Count two

Appellants next allege that from September 1, 2001 until October 22, 2001 (the date of the trustee's sale), Principal "misrepresented to Plaintiff material facts necessary to cure the default"; misrepresented the status of the proceedings; misrepresented that Principal would hold the sale in abeyance; and made "other material misrepresentations, including the status of foreclosure proceedings . . . ."

The allegations here are simply conclusory statements that do not state with any degree of specificity what was said and by whom. Besides failing to detail in depth the exact misrepresentation, appellants have not identified who made the representations, and what authority they had to do so. "The requirement of specificity in a fraud action against a corporation requires the plaintiff to allege the names of the persons who made

the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written. [Citations.]" *(Tarmann v. State Farm Mut. Auto. Ins. Co*. (1991) 2 Cal.App.4th 153, 157.) Here, appellants fail to present the explicit facts called for in a pleading for fraud.

c. Count three

Appellants lastly state that Principal, in collusion with the Chungs, "intentionally concealed the fact that the property was going to trustee sale on September 26, 2001."[3] The gist of the pleadings is that appellants were trying to sell the property prior to foreclosure, but were prevented from doing so because Principal would not give them payoff information, and would not disclose the date of the trustee's sale.

Once again, the allegations fall short of what is required for fraud. Appellants contend that the wrongful acts took place between August 1, 2001 and October 22, 2001. As in the previous section, the facts are non-specific as to what was said, when it was said, who said it, and the authority of such person to make such a representation.

Additionally, appellants make reference to their request to be made aware of the status of "their loan." However, there are no allegations to support the statement that appellants ever had a loan with Principal or SWM, or that either of those entities ever consented to appellants assuming the loan in place of Mayoral. Nor do appellants allege any specific facts to support any statutory violation of law by respondents in the handling of the foreclosure, including notice to any interested person.

4. Leave to amend

The final issue is whether the trial court erred in failing to allow appellants an additional attempt to amend the pleadings.

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[3] Appellants previously asserted that the trustee's sale took place on October 22, 2001.

The standard of appellate review here is abuse of discretion. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1126.) Reversal is called for only where there is a reasonable possibility the pleadings can be cured by an amendment. (*Ibid*.) The burden is on an appellant to show how the complaint could be amended to state a valid cause of action against a respondent. (*Hendy v. Losse* (1991) 54 Cal.3d 723, 742.)

Although appellants have requested leave to amend at both the trial court level and here, they have neglected in both forums to show how or in what manner they could allege any new facts that would support a viable cause of action against respondents. They have now had three attempts to do so, all without success. Accordingly, the trial court's ruling was not an abuse of discretion.

DISPOSITION

The judgment of dismissal is affirmed. Respondents are awarded costs on appeal.

NOT FOR PUBLICATION.

_____, J.
NOTT

We concur:

_____, P.J.
BOREN

_____, J.
ASHMANN-GERST